No. 82-701

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEW CASTLE AREA TRANSIT AUTHORITY,

Petitioner,

v.

ROBERT M. KRAMER, LUTHER A. MILLER, DONALD PETTITT, HOWARD N. BARNES, DAVID R. SHAW, GERALD J. MAGGIE, ERNEST ORELLI, PHILLIPS C. REED, JAMES W. BURNS, G. MAXINE PARDICK, MARTHA E. KEITH, JAMES L. RAMSEY, CLYDE W. REED, RALPH L. JONES, PHILLIPS W. REED, JOHN P. CARSON, ROBERT C. BRUNSWICK, DAVID C. MATTHEWS, WALTER R. SLACK, WILLIAM L. HANNA, LOUIS V. PAGLIARO, and all other plaintiffs similarly situated,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LINDA R. HIRSHMAN,
JACOBS, BURNS, SUGARMAN
& ORLOVE,
201 North Wells Street, Suite 1900,
Chicago, Illinois 60606,
Telephone: 312/372-1646.

EARLE PUTNAM,
General Counsel,
Amalgamated Transit Union,
5025 Wisconsin Avenue, N.W.,
Washington, D.C. 20016.

Of Counsel:

Keenan Printing Company 312-648-0050 365

QUESTIONS PRESENTED

The urban mass transit industry has historically been dominated by the private sector and subject to federal commerce power legislation; recently, under the impetus of large scale federal funding, local transit authorities have entered the field. Under these circumstances, did the United States Court of Appeals err in concluding that, in light of *United Transportation Union* v. *Long Island Railroad*, 455 U.S. ——, 102 S. Ct. 1349, 71 L. Ed. 2d 547 (1982), the doctrine of intergovernmental immunity, recognized in *National League of Cities* v. *Usery*, 426 U.S. 832 (1976), does not bar the application of the Fair Labor Standards Act to the employees of a local public transit authority.

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IN THE

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v.

ROBERT M. KRAMER, LUTHER A. MILLER, DONALD PETTITT, HOWARD N. BARNES, DAVID R. SHAW, GERALD J. MAGGIE, ERNEST ORELLI, PHILLIPS C. REED, JAMES W. BURNS, G. MAXINE PARDICK, MARTHA E. KEITH, JAMES L. RAMSEY, CLYDE W. REED, RALPH L. JONES, PHILLIPS W. REED, JOHN P. CARSON, ROBERT C. BRUNSWICK, DAVID C. MATTHEWS, WALTER R. SLACK, WILLIAM L. HANNA, LOUIS V. PAGLIARO, and all other plaintiffs similarly situated,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Constitutional Provisions and Statutes Involved.

The pertinent portions of the U.S. Constitution, the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* (1976 & Supp. IV 1980), and the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601 *et seq.* (1976 & Supp. IV 1980), are set forth in the Appendix at pp. B1-B7.

Statement of the Case.

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, as amended, requires employers covered by the Act, including transit companies engaged in commerce, whether public or private, to pay their employees a minimum hourly wage and to pay them at no less than one and one-half times their regular rate of pay for hours worked in excess of 40 during a work week. See 29 U.S.C. § 206 (a)(1) and 207(a)(1). In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (hereinafter "*NLC*"), this Court recognized a constitutional doctrine of intergovernmental immunity that restricts Congress' otherwise plenary power to legislate respecting commerce in a fashion that would "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." *Id.* at 852. On that basis, this Court ruled that the FLSA's minimum wage and maximum hour protection could not be applied to such functions.

In response to the *NLC* ruling, on December 21, 1979, the Secretary of Labor amended the statement of FLSA enforcement policy to provide a listing of governmental activities outside the scope of the states' tenth amendment immunity from application of the FLSA. On that list, the Secretary placed mass transit systems in the category of government activities *not* integral to a traditional government function and hence subject to the FLSA. 44 Fed. Reg. 75630 (1979) (codified at 29 C.F.R. 775.3(b)(3)).

Petitioner, New Castle Transit Authority, is a publicly owned transit authority which, since 1958, has provided transit service in the area of New Castle, Pennsylvania. Like other transit authorities, since 1965, New Castle has received substantial federal financial assistance under the Urban Mass Transportation Act ("UMTA"), 49 U.S.C. § 1601 *et seq.* (1976 & Supp. IV 1980).

After the Secretary of Labor announced his classification of transit as a function not exempted from the FLSA, see p. 2, *supra*, Respondents, 21 bus drivers employed by Petitioner, filed an action in the United States District Court for the Western District of Pennsylvania for overtime pay due them under the Act. On June 11, 1981, the district court rendered judgment for the petitioner, reasoning that, under *NLC*, the public takeover in New Castle barred respondent's claim (Pet. App. at 19). The employees appealed.

Relying on this Court's elaboration of the *NLC* rationale in *Hodel* v. *Virginia Surface Mining & Recl. Ass'n.*, 452 U.S. 264 (1981) (hereinafter "*Hodel*"), and *United Transportation Union* v. *Long Island Railroad*, 455 U.S. ——, 102 S. Ct. 1349 (1982) (hereinafter "*Transportation Union*"), issued after the district court's decision, the court of appeals reversed the judgment of the district court.

ARGUMENT

A. The decision of the court of appeals carefully applies the teaching of this Court in *NLC*, *Hodel* and *Transportation Union*, to the situation of a particular industry—mass transit. The decision below is correct; it plainly does not conflict with any decision of this Court, nor does it conflict with a decision of any court of appeals.

The court of appeals noted that local mass transit systems had been historically owned and operated by private companies,[1] and that:

> . . . The whole move away from private transit systems and into public systems was started and effected by the federal government which provided the financial support to allow the changeover to public transportation companies. Moreover, the federal government has, through the matching funds program, maintained an intimate involvement with the operation of such public systems. The result has been a network of publicly run systems which are cooperations between the federal government and the states. . . .

(Petitioner's Appendix at 9a) (hereinafter "Pet. App."). That court concluded:

> . . . Massive state involvement with mass transit was *created* by the national government and the states are precluded from claiming, at this late date, that mass transit is a service which they traditionally provide. Tradition must be gauged in light of which actually happened, and what happened is a federal program of local transit service in which the states participate as late comer junior partners. There is, therefore, no tradition of the states *qua* states providing mass transportation. Moreover, since it is undisputed that the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the states, by acquiring functions previously performed by the private sector, to erode

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1. In 1960, 95% of transit systems were privately owned and operated. H.R. Rep. No. 204, 88th Cong., 1st Sess. 22 (1963), *reprinted in*, 1964 U.S. Code Cong. & Ad. News, 2569, 2590. Not until 1967 were even half of all transit riders patronizing publicly owned systems. American Public Transit Authority, Transit Fact Book, 1981, page 27.

> federal authority in this area. *See generally, United Transportation Union, supra,* 50 U.S.L.W. at 4318.

(*Id.* at 10a).

Judge Garth, concurring, added that, although he agreed with the principal opinion's conclusion that petitioner was not performing a traditional local governmental function and was for that reason not entitled to immunity from the application of the FLSA, he would also conclude that New Castle's compliance with the FLSA would not, in any event, "endanger" the "separate and independent existence" of the state and, accordingly, under *Transportation Union,* was not exempt from the FLSA for that independent reason. (*Id.,* at 11a, citing *Transportation Union, supra*).

These rulings faithfully apply the *NLC* rule as explained and refined in *Hodel* and *Transportation Union.* As this Court stated in the latter decision:

> "*[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of National League of Cities must satisfy each of three requirements.* First, there must be a showing that the challenged regulation regulates the 'States as States.' *Id.,* [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' *Id.,* at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' *Id.,* at 852."

In *Transportation Union,* this Court went on to stress:

> [t]he *key prong* of the *National League of Cities* test . . . is the *third one,* which examines *whether "the States' compliance with federal law would directly impair their ability' to structure integral operations in areas of traditional functions.'* "

455 U.S. at ——, 102 S. Ct. at 1353, quoting *NLC,* 426 U.S. at 852 (emphasis added).

> This "prong," said the Court, require[s] an inquiry into whether the federal regulation affects basic State prerogatives in such a way as would be likely to *hamper the state government's ability to fulfill its role in the Union* and *endanger its "separate and independent existence."* [*NLC, supra*], 426 U.S. at 851.

Looking specifically at a recently acquired local public commuter railroad, this Court concluded that the tenth amendment does not require "a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation." *Id.* at 1355.

The court of appeals correctly recognized that even the reading of *Transportation Union* most favorable to Petitioner forecloses acceptance of Petitioner's claim that it, or mass transit generally, is immune from federal commerce power legislation. First, no principled distinction between the services performed by the Long Island Railroad and those performed by Petitioner or other mass transit operations is possible. As the Court recognized in *Transportation Union*, the operations of the Long Island Railroad primarily involve the transportation of commuter passengers within particular urban areas to and from work, school, and stores. *Transportation Union, supra*, 455 U.S. at ——, n. 1, 102 S. Ct. at 1351, n. 1.

Second, the history of the Long Island Railroad is indistinguishable from the history of the rest of mass transit. After years of private ownership, the Long Island Railroad was acquired by an agency of the state of New York in 1966, following passage of the federal UMTA. Similarly, the public takeover of mass transit systems,

95% of which were in private hands in 1961, also occurred in the years following the passage of the federal act.

Third, like the Long Island Railroad, the rest of transit was subject to overall federal regulation when in the private sphere.[2]

Finally, in the overwhelming majority of cases in transit generally, the actual acquisition by the public authority of the system from private owners was financed by a federal UMTA grant. Federal capital assistance was the cause of general public involvement (cf. Pet. Br., at 10-11). After providing the wherewithall for local public bodies

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2. From its enactment in 1935, the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1976 & Supp. IV (1980)), has applied to private transit on terms equally with other industries "affecting commerce." *Amalgamated Assn. of Street, Electric & Motor Coach Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 391-92, n. 13 (1951) (holding that the NLRA preempted a Wisconsin law prohibiting strikes by private transit employees).

Since 1961, the FLSA, the Act at issue here, has also applied to the private transit industry. When, in 1966, Congress became aware that federal UMTA funds were fueling the public takeover of mass transit in many cities, Congress extended FLSA coverage to include publicly owned transit, thus ensuring that, as a statutory matter, public takeovers did not oust the federal regulatory scheme that the FLSA imposed on private transit labor relations. FLSA Amendments of 1966, § 102.

Other subsequently enacted national labor legislation applied to the private transit industry; *i.e.*, Labor Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified at 29 U.S.C. § 40 *et seq.* (1976 & Supp. IV 1980)) (reporting requirements); the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1976 & Supp. IV 1980)) (requiring equal pay for women for equal work); Title vii of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241, 253-66 (codified at 42 U.S.C. § 2000e (1976 & Supp. IV 1980)) (prohibiting employment discrimination on the basis of race, sex, creed, or national origin).

to involve themselves in the provision of transit services, the federal government continued to underwrite the undertaking on a scale distinct from the federal assistance in any other area.[3]

B. Petitioner's difference with the appeals court opinion rests largely on Petitioner's disagreement with that court's understanding of the factual history of mass transit. (1) Petitioner contends that, in determining whether transit had a long history of private provision, the court of appeals should have confined its review to transit in cities of over 250,000 population or 500,000 population in 1964 (Pet. Br., at 9). Petitioner nowhere sets forth why this should be the measure; in 1964, only 16% of the entire American population lived in such large communities. (2) Petitioner also proposes, again without explanation, that, for the "history" of transit, this Court should look at the year *1979*, well after the federal commerce clause legislation applied to the undertaking and after federal funding had enabled the states and localities to enter the industry (Pet. Br., at 12). Petitioner's proposed contemporaneous analysis would load the scales inevitably toward a finding of immunity and is simply contrary to this Court's approach in *Transportation Union*.

C. Petitioner correctly points out that a number of other cases involving whether the states may immunize mass transit from federal regulation are pending in various courts. (Pet. Br., at 16). See, *Dove* v. *Chattanooga Area*

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3. Federal operating assistance is available for 80% of the cost of transit capital projects, 49 U.S.C. § 1603(a), and 50% of transit operating deficits, 49 U.S.C. § 1604(e), while, for example, localities receive federal assistance for only 8.8% of the cost of education and 12% of public safety. National Center for Education Statistics, Digest of Education Statistics, (1976); U.S. Census Bureau, Governmental Finances (1977-78).

Regional Transportation Authority, Civ-1-80-249 (E.D. Tenn. July 21, 1981), appeal pending, No. 81-5636 (6th Cir.) (argued 11/4/82); *Joiner* v. *Macon*, No. 79-287-MAC (M.D. Ga. Apr. 27, 1981), appeal pending, No. 81-7789 (11th Cir.) (argued 11/2/82); *Alewine* v. *Augusta*, 505 F. Supp. 880, 884 (M.D. Ga. 1982) appeal pending, No. 81-7490 (11th Cir.) (argued 11/2/82); *Francis* v. *Tallahassee*, No. 79-446 (2nd Cir. Fla. 1980); *San Antonio Metropolitan Transit Authority* v. *Donovan*, 457 U.S. ——, 102 S. Ct. 2897 (1982), pending after remand, No. SA 79 CA 457 (W.D. Tex.); *Scholz* v. *LaCrosse*, No. 80 C 238 (W.D. Wisc. Sept. 1, 1982). In the only other opinion issued since *Transportation Union*, a district court also ruled that the state could not take transit from the private sphere and thereby immunize it from federal law. *See Scholz* v. *LaCrosse*, *supra*. (A copy of the decision of the district court in *Scholz* v. *LaCrosse* is attached hereto as App. p. A1).

As these cases reflect, of the several hundred transit providers in the United States, only a handful do not already pay their employees for the disputed overtime work. Moreover, the few courts to consider the matter thus far agree that *Transportation Union* dictates the outcome the court of appeals reached here.[4] Should a conflict develop

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4. Attempting to create the appearance of a conflict, Petitioner proffers the recent decision of the United States Court of Appeals for the First Circuit in *Molina-Estrada* v. *Puerto Rico Highway Authority*, 650 F. 2d 841 (1st Cir. 1982), denying the FLSA claims of Puerto Rican highway workers (Pet. Br., at 17). *Molina-Estrada* was actually decided on the statutory ground that the FLSA applies equally to Puerto Rico and the states. However, addressing the underlying constitutional question of whether the states would have been immune in operations such as the Puerto Rico Highway Authority, the court noted that road building had

(Footnote continued on next page)

out of the cases already cited, there will be time enough for this Court to review the matter and to provide additional guidance to the lower courts.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

LINDA R. HIRSHMAN,
JACOBS, BURNS, SUGARMAN
& ORLOVE,
201 North Wells Street, Suite 1900,
Chicago, Illinois 60606,
Telephone: 312/372-1646.

EARLE PUTNAM,
General Counsel,
Amalgamated Transit Union,
5025 Wisconsin Avenue, N.W.,
Washington, D.C. 20016.

Of Counsel:

(Footnote continued from preceding page)
been a public function "from time immemorial," (*Id.* 650 F. 2d at 845) refused to consider any other function performed or planned by the authority, because "the appellants are not [doing the other jobs"] (*id.* at 846), and explained that "the parties here are apparently willing to have us apply" a standard for activities *always in the public sphere.* (*id.* at 845). On the question presented here, the court of appeals did cite with approval its own earlier decision refusing to apply intergovernmental immunity to an important community service—telephone communications—which had recently been transferred into the public sphere. *See Puerto Rican Telephone Co.* v. *F.C.C.*, 553 F. 2d 694 (1st Cir. 1977), cited *Id.* at 844.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN J. SCHOLZ, VIRGIL HALDORSON, LeROY MEYERS, KENNETH BYE, JOHN SMABY, LEO KRUSCHEK, CARL SCHROEDER, LINDA MILLER, EUGENE BYERSON, WILLIAM BERG, GERALD DAHLKE, DONALD DENNY, THOMAS DeVRIES, ROGER FRY, EUGENE HALL, TERRY HICKS, THOMAS HILL, MILO HOETH, GREGORY JOHNSON, STEVEN KNUTSON, CONRAD NOHR, RUSSELL PAGE, STEVEN PHAFF, GARY PICHA, WILLIAM RUDY, THOMAS SANDERSON, JOHN STEELE, ROYCE VON LANKEN, ROBERT WOOD, CHARLES HUTH, GIL DEGENHARDT,

Plaintiffs,

v.

CITY OF LA CROSSE, a municipal corporation; RON BRACEGIRDLE, as President of the Municipal Transit Utility, City of La Crosse, his successors, agents and assigns and all those acting in concert therewith; JEROME RUSCH, as Director of Personnel, City of La Crosse, his successors, agents, assigns, and all those acting in concert therewith; and WESLEY M. DENNY, as City Treasurer, City of La Crosse, his successors, agents, assigns, and all those acting in concert therewith,

Defendants.

MEMORANDUM AND ORDER

80-C-238

Before this Court in this matter are cross motions for summary judgment. The Court reserves judgment as to

damages and other relief, but otherwise grants plaintiffs' motion and denies defendants' motion.

This action was brought pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 to 219. Jurisdiction is asserted, uncontroverted, and appears to be correctly based, on 28 U.S.C. § 1337 and 29 U.S.C. § 216(b).

The following facts necessary to the decision reached by the Court are undisputed:

FACTS

Plaintiffs are now, or have been during the past three years, bus operators employed by the City of La Crosse and the La Crosse Municipal Transit Utility.

Defendants are the City of La Crosse, a municipal corporation organized under Wisconsin law, and various individuals employed by the City of La Crosse to manage its Municipal Transit Utility which is an agency of the city government. Hereinafter, the defendants will be referred to as "the city."

The city purchased the La Crosse Transit Company, a privately owned mass transit system, on or about January 1, 1975, and thereafter formed the La Crosse Municipal Transit Utility (LMTU). The purchase was, at least in part, funded by a grant of federal money made available under the Urban Mass Transportation Act. The city had, for approximately four years prior to the purchase, subsidized the private operation of the transit system.

Prior to the purchase of the transit system by the city, the bus operators of the system were covered under FLSA and received, in accordance with FLSA provisions, overtime compensation for hours worked in excess of a predetermined work week. Since the purchase by the city, the

bus operators have not received time and one-half for overtime although the latest contract bargained between the city and the bus operators (represented by the Amalgamated Transit Union, AFL-CIO, Local 519) does provide for overtime pay for hours worked in a week in excess of forty-four hours. During the past three years, FLSA required time and one-half for overtime for covered employees. The LMTU is not a suable entity. The transit system is a city owned and operated utility and its bus operators are city employees. Compensation is fixed by the common council of the city after collective bargaining.

The transit system operates exclusively within the city. In the recent past, some bus routes ran into the Town of Shelby, an area adjacent to La Crosse and, like the city, entirely within the State of Wisconsin. No interstate transportation is provided by the system.

In addition to the funds received from the federal government for the purchase of the system, the city receives federal funds for operations and capital equipment.

The system provides transportation services to the people of the City of La Crosse, a city of approximately 50,000 persons. Ridership statistics show an average of 3,700 fares paid daily. A privately operated taxicab company operates within the city. The predominant mode of transportation in the city is the private automobile.

MEMORANDUM

The issue presented in this section is whether bus operators employed by a city, driving routes entirely within the city and its adjacent areas but not in interstate commerce, are covered employees under the overtime compensation requirements of FLSA. Plaintiff bus operators assert that they are; the city maintains that they are not,

and that any requirement to the contrary would contravene the Tenth Amendment reservation of powers to the states.

Both parties recognize that *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), and the cases which followed it are controlling here. The test which states and municipalities must pass in order to legitimately assert Tenth Amendment was enunciated in *Hodel* v. *Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 287-88 (1981);

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged regulation regulates the "States as States." Second, the federal regulation must address matters that are undisputably "attributes of state sovereignty," and third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental function."

There has been little argument concerning the first two of these requirements. The Court concludes that they have been met and recognizes that they would be anytime that the wages and working conditons of state or municipal employees are regulated by the federal government.

The question, therefore, relates to whether providing mass transportation to city residents by a municipal government is a "traditional governmental function." While the Court believes that an analysis in this regard to be an exercise in the useless splitting of hairs, it is nonetheless required under *National League of Cities*. The status of the bus operators as city employees should be the end of the inquiry, but it is not.

It appears to the Court that there are three ways to undertake such analysis. First, the Court could demand extensive evidence concerning the historical record of municipal operation of transit systems nationwide. The record in this case is devoid of such information. However, other Courts which have faced the particiular issue have undertaken such an inquiry and the results are available. See *Kramer* v. *New Castle Area Transit Authority*, 677 F. 2d 308, 309 (3rd Cir. 1982), where the Court found that various large cities began to operate transit systems as early as 1911, but that the practice did not become widespread until relatively recently. The availability of federal money to purchase or subsidize transit systems precipitated this movement in the 1960's.

Under such an analysis, the city's argument would fall. As the *Kramer* court decided, a practice which did not gain widespread acceptance until less than twenty years ago, and which is not, even today, the predominant method of providing a service, cannot be considered a "traditonal function of government."

Second, the Court could consider the evidence provided concerning the municpal operation itself from an historical viewpoint. This would be the least satisfying approach to the question. But, again, the city's argument cannot prevail. The city has operated the system for something more than seven years, hardly long enough to establish the practice as a tradition.

Third, and probably the most productive analysis, is by analogy to the functions which have been found to be traditional (and, of course, to those which have been held to be not traditional). Defendants' attempts to find provision of transit services comparable to city operation of schools,

hospitals, parks and garbage collection are totally unconvincing. Although none of these services were consistently provided everywhere in the 19th century, they frequently were. And municipal operation of such services probably existed in some places prior to the adoption of the Constitution.

Much more helpful are two court decisions which face exactly the issue in this case: Whether mass transit is a traditional governmental function so that imposition of FLSA overtime provisions can be applied to municipal employees of such systems. In *Kramer*, supra, the Court specifically held that operation of a transit system was not a traditional government function:

> We think that the state involvement in local transit systems, increasing with more systems coming under state control in recent years, does not alter the "historical reality" that the operation of mass transit systems "is not among the functions *traditionally* performed by state and local governments." (emphasis in original)

677 F. 2d at 310. On the other hand, the Court in *San Antonio Metro Transit Authority* v. *Donovan*, 25 W&H 271 (W.D. Tex. 1981), concluded precisely the opposite. However, this decision was vacated and remanded by the Supreme Court, at 102 S. Ct. 2897 (1982) for reconsideration in light of *United Transportation Union* v. *Long Island Railroad*, —— U.S. ——, 102 S. Ct. 1349 (1982). While *Long Island* provides substantive argument for both sides, this Court is compelled to conclude that providing transportation is not a traditional governmental function.

In *Long Island*, Chief Justice Burger, speaking for a unanimous Court, stated:

> Operation of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not state or local governments. It is certainly true that some passenger railroads have come under state control in recent years, as have several freight lines, but that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments. (Emphasis in original.)

102 S. Ct. at 1354. It seems inescapable that, by replacing the term "passenger railroads" above with "mass transit," the statement above would remain true. The Chief Justice did justify the opinion in *Long Island* by extensive reference to the interstate commerce aspects of the railroad in question. However, such references in no way lessen the force which he believed the meaning of "traditional" to be:

> Just as the Federal Government cannot usurp traditional state functions, there is no justification for a rule which would allow the States, *by acquiring functions previously performed by the private sector,* to erode federal authority in areas traditionally subject to federal statutory regulation. (Emphasis added.)

Id. at 1355. The city has acquired a function "previously performed by the private sector." The area "traditionally subject to federal statutory regulation" here is wages and hours under the Fair Labor Standards Act. The import of the *Long Island* decision is that a state or municipality cannot subvert the federal policy by purchasing the private business. Although the city may very well not have intended this when it purchased the transit system in 1975, it is precisely the effect which has occurred.

CONCLUSION

From the foregoing, the Court determines that the plaintiff bus operators are covered employees under the Fair Labor Standards Act.

Accordingly,

ORDER

IT IS ORDERED that defendants' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment is GRANTED as to liability, and in other respects DENIED.

Entered this 1st day of September, 1982.

BY THE COURT:

JOHN C. SHABAZ,
District Judge.

APPENDIX B

1. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power
>
> • • •
>
> To regulate Commerce • • • among the several States • • •;
>
> • • •
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof • • • shall be the supreme Law of the Land • • •.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. The Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (1976 & Supp. IV 1980) provides in pertinent part:

29 U.S.C. 202:

> (a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels

and instrumentalities of commerce to be used to spread and perpetrate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without susbtantially curtailing employment or earning power.

29 U.S.C. 203. As used in this chapter:

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

* * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose. * * * For purposes of this subsection, the activities performed by any person or persons—

* * *

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of

such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

• • •

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

• • •

(5) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(6) is an activity of a public agency.

• • •

The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

29 U.S.C. 206(a):

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:
>
> (1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

29 U.S.C. 207(a):

> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

3. The Urban Mass Transportation Act of 1964, 49 U.S.C. 1601 *et seq.* (1976 & Supp. IV 1980) provides in pertinent part:

49 U.S.C. 1601:

(a) The Congress finds—

> (1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;
>
> (2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within

such areas, and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and

(3) that Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems.

(b) The purposes of this chapter are—

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private.

(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

49 U.S.C. § 1601(a):

The Congress finds that the rapid urbanization and the continued dispersal of population and activities within urban areas has made the ability of all citizens to move quickly and at a reasonable cost an urgent national problem; that it is imperative, if efficient, safe, and convenient transportation compatible with soundly planned urban areas is to be achieved, to continue and expand this chapter; and that success will require a Federal commitment for the expendi-

ture of at least $10,000,000,000 over a twelve-year period to permit confident and continuing local planning, and greater flexibility in program administration. It is the purpose of this Act to create a partnership which permits the local community, through Federal financial assistance, to exercise the initiative necessary to satisfy its urban mass transportation requirements

59 U.S.C. § 1602(e):

No financial assistance shall be provided under this chapter to any State or local public body or agency thereof for the purpose, directly or indirectly, of acquiring any interest in, or purchasing any facilities or other property of, a private mass transportation company, or for the purpose of constructing, improving, or reconstructing any facilities or other property acquired (after July 9, 1964) from any such company, or for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless (1) the Secretary finds that such assistance is essential to the program of projects required by section 1607 of this title, (2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies, (3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws, and (4) the Secretary of Labor certifies that such assistance complies with the requirements of section 1609(c) of this title.

49 U.S.C. 1603(a):

• • • The Federal grant for any such project to be assisted under Section 1602 of this title shall be in an amount equal to 80 per centum of the net project cost. • • •

49 U.S.C. 1604(e):

> The Federal grant for any construction project under this section shall not exceed 80 per centum of the cost of the construction project, as determined under section 1603(a) of this title. The Federal grant for any project for the payment of subsidies for operating expenses shall not exceed 50 per centum of the cost of such operating expense project. * * *

49 U.S.C. (Supp. IV) § 1609(c):

> (c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.